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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

IAN DECO LIGHTBOURNE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE
SUPREME COURT OF FLORIDA

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OCTOBER TERM 1983

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vs.

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PETITION FOR WRIT OF CERTIORARI
FROM THE SUPREME COURT OF FLORIDA

Petitioner prays that the writ of certiorari issue to review the judgment of the Florida Supreme Court filed September 15, 1983, upon which rehearing was denied on October 26, 1983.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida which is the subject of this petition is reported as Lightbourne v. State, 438 So.2d 380 (Fla. 1983) and is set out as Appendix A to this petition. Rehearing with respect to this opinion was denied, and the order denying rehearing is attached as Appendix B to this petition.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on September 15, 1983, and petitioner's timely motion for rehearing was denied on October 26, 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein the deprivation of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth, Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

On February 18, 1981, the Marion County, Florida, Grand Jury

filed an Indictment charging that the Defendant, IAN DECO LIGHTBOURNE, "Did unlawfully, from a premeditated design to effect the death of a human being and/or while engaged in the perpetration of a burglary and/or involuntary sexual battery, kill and murder Nancy A. O'Farrell, a human being, by shooting her with a firearm, to-wit, a .25 caliber automatic pistol."

Defense counsel filed numerous pretrial motions, including a Motion to Dismiss the Indictment, a Motion in Limine, a Motion to Dismiss Indictment or to Declare that Death is not a Possible Penalty, a Motion to Declare Florida Statutes 775.082(1) and 921.141 Unconstitutional, a Motion for Statement of Particulars, a Demand to Disclose Criminal Records of State's Witnesses, a Motion to Declare Florida Statute 782.04(1) Unconstitutional, a Motion to Suppress, a Motion in Limine, a second Motion to Suppress, a Motion to Impose Sanctions, an additional Motion to Suppress Statements, an additional Motion to Suppress Certain Personal Belongings of Defendant at Marion County Jail, and a Motion for New Trial or Arrest of Judgment.

The trial court denied Defendant's Motion to Dismiss the Indictment, denied Defendant's Motion to Dismiss the Indictment or to Declare that Death is not a Possible Penalty, denied Defendant's Motion to Declare Florida Statutes 775.082(1) and 921.141 Unconstitutional, denied Defendant's second Motion to Suppress, denied Defendant's Motion to Suppress, denied Defendant's Motion to Impose Sanctions, denied Defendant's Motion to Suppress Statements, implicitly denied Defendant's Motion in Limine, and denied Defendant's Motion to Suppress Certain Personal Belongings of Defendant located at Marion County Jail.

Trial by jury commenced on April 21, 1981, before the Honorable William T. Swigert, Judge of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Marion County.

Following the denial of Lightbourne's Motion for Directed Verdict of Acquittal, the jury found the Defendant guilty of

murder in the first degree by premeditated murder and felony murder in the perpetration of a sexual battery and felony murder in the perpetration of burglary.

On May 1, 1981, following the presentation of additional testimony and evidence, the jury recommended that the death penalty be imposed. After considering the presentence investigation and a letter by Lightbourne to the Court, including the confidential portion of the presentence investigation which was furnished to the State and to Defendant, and the subsequent denial of the Defendant's Motion for New Trial and/or Arrest of Judgment, the Court sentenced Lightbourne to death.

Thereafter, petitioner appealed his conviction and sentence to the Supreme Court of Florida, which affirmed the conviction and sentence. Lightbourne v. State, 438 So.2d 380 (Fla. 1983). Rehearing with respect to that decision was denied on October 26, 1983 and petitioner timely filed in this Court for certiorari review.

STATEMENT OF THE FACTS

On Saturday, January 17, 1981, at approximately 4:00 to 5:00 p.m. Mary O'Farrell Lewis and her husband James B. Lewis arrived in Ocala, Marion County, Florida for the purpose of picking up some furniture that was stored at the house of the victim, Nancy O'Farrell. Mary O'Farrell Lewis was the sister of the victim, Nancy O'Farrell. When Mr. and Mrs. Lewis arrived at the residence of Nancy O'Farrell, they noticed that her automobile was present. They proceeded to knock on the front door and, receiving no answer, walked around by the side of the house where they noticed a broken window. Thereafter, they went to the back of the O'Farrell residence and opened the unlocked sliding glass door. Upon proceeding inside the house, Mrs. Lewis walked into the bedroom of Nancy O'Farrell and saw her sister lying on the bed. Assuming that her sister was asleep and noticing that Nancy O'Farrell was dressed in pants and a bra whiling lying on her back

with her hands clasped on her stomach, Mrs. Lewis requested that her husband not enter the bedroom. Additionally, a pillow was under and to the side of the head of Nancy O'Farrell. After realizing something was wrong, Mrs. Lewis left the room and asked her husband to go inside. Mr. and Mrs. Lewis decided to call the police and noticed that the line to the kitchen telephone had been cut. Thereafter, Mr. and Mrs. Lewis proceeded to the residence of the parents of the victim and telephoned the Marion County Sheriff's Office from there. On cross examination Mrs. Lewis admitted that she had visited the residence of the victim at Christmas time the preceding year and had not noticed whether or not the broken window previously mentioned had been broken at the time. Also, Mrs. Lewis admitted that her sister, Nancy O'Farrell, had generally maintained a cluttered residence and that when she (Mrs. Lewis) and her husband entered the residence on January 17, 1981, there was nothing that showed evidence of a struggle. No furniture was knocked over and things were not out of place.

Shortly after the Lewis telephone call, the Ocala Sheriff's Department and certain medical personnel arrived on the scene. Pictures of the scene were taken. Subsequent investigation revealed that the telephone line in the bedroom of Nancy O'Farrell had also been cut.

Technician Snook examined Nancy O'Farrell for breath sounds, heart sounds, did a carotid pulse, used a stethoscope and then determined there was no life left in her.

As a result of the condition of the body of the victim and the lack of apparent violence in her residence, emergency medical technician Donald Darley testified that he thought the death of the victim might have been a suicide.

At trial Dr. Gertrude Warner was qualified as an expert in pathology and testified that on the evening in question she was called to the O'Farrell residence. There she observed the body of the victim located as previously described and noticed a large

pool of drying and dried blood on the left side of the victim's body all along the top of the bespread. Further, Dr. Warner observed that there was a bullet wound in the left side of the head between the eye and the cheek and that there was a great deal of blood there. In her opinion, it was evident that this was a fresh gunshot wound and that the victim had bled to death. Furthermore, Dr. Warner testified that there were no obvious bruises or lacerations or other types of injury apparent on the body. In Dr. Warner's opinion, the victim had been dead probably eighteen hours by the time she saw her which was at dusk on January 17, 1981. At approximately 6:00 p.m. on that date, Dr. Warner pronounced the victim dead.

At the time the body of the victim was removed from the bed to the stretcher for transportation to the morgue, a copper colored object was obtained from the top of the bedspread. This object was later identified as a cartridge case.

At 9:30 a.m. on January 18, 1981, Dr. Warner performed an autopsy on the body of the victim which had been removed to the hospital morgue. In examining the bra and panties which the victim was wearing at the time of her death, Dr. Warner noticed a brownish stain in the crotch and fresh blood stain on the left side of the panties. The brownish stain was interpreted by Dr. Warner as stain from menstrual secretion. In conducting x-rays as part of the autopsy Dr. Warner determined there was a bullet present in the posterior part of the head of the victim and the bullet was removed during the course of the autopsy. Also, during the autopsy vaginal fluid was aspirated from the vagina and was preserved in a "rape kit" provided by the Marion County Sheriff's Department. Pubic and head hairs were also removed from the victim. In examining the vaginal secretions, Dr. Warner determined that there was acid phosphatase present in the secretions which, in her opinion, was associated with the presence of male semen. Her opinion was that the acid phosphatase had been

deposited within the vagina within the time span of less than forty-eight hours preceding death. In addition, Dr. Warner's examination of the vaginal secretions showed the presence of male spermatozoa. Dr. Warner also testified that these were intact spermatozoa and, in her opinion, should have been placed within the vagina within forty-eight hours from the time of her examination of the body, since otherwise they would have been in deteriorated condition.

As a result of her complete autopsy, Dr. Warner testified that the cause of death of the victim was due to the hemorrhage from the brain injury caused by the bullet wound, resulting in almost immediate death. Dr. Warner specifically testified that there was no way she could determine whether or not there had been consensual or forced sexual activity, or whether the sexual encounter or death occurred first.

Samples of pubic and head hair of the Defendant were obtained pursuant to court order, as well as a blood sample. The blood and hair samples of the defendant were taken to the Florida Department of Criminal Law Enforcement laboratory in Sanford, Florida, by Investigator Frederick E. LaTorre of the Marion County Sheriff's Department.

Mr. Keith R. Paul was qualified by the Court as an expert in forensic serology and testified that he had examined the blood and semen forwarded to him from the scene of the crime. After detailed technical testimony, Mr. Paul indicated that his testing was such that it was consistent with having been placed there by an individual with blood type and PGM factor the same as that of the defendant. However, he further testified that his analysis of the semen stain would not indicate the race of the person who placed it on the victim's panties.

Ms. Mary Ann Mayer was qualified by the Court as an expert microanalyst and testified that she examined a single pubic hair which had been removed from the scene of the crime and compared it

to those of the defendant and determined that the hair was microscopically the same. However, Ms. Mayer also testified that the pubic combings of the victim yielded no hair which could be identified as that of the defendant.

Finally, with regard to the scientific evidence present in the case, Charles R. Meyers was stipulated to be an expert in the area of forensic ballistics and testified that he examined the projectile which had been removed from the head of the decedent and compared it with that test-fired by him at the crime laboratory from a pistol which had previously been taken from the defendant by law enforcement officers, as will be explained hereinafter. He testified that as a result of this comparison test it was his professional opinion that the bullet removed from the head of the victim was fired from the pistol taken from the defendant. Furthermore, he testified that he compared the cartridge case removed from the scene of the crime with that test-fired from the defendant's pistol and that, in his opinion, the fired cartridge case from the scene was fired in the defendant's pistol. Mr. Meyers also testified that he had examined a pair of black leather gloves which had been forwarded to him in connection with this case for indication of firearms residue and found no such residue on the gloves.

Additional testimony in the case by Evelyn Underwood showed that the defendant had worked at the Ocala Stud Farm, which was owned by the parents of the decedent, and during this period of time she had never heard the defendant threaten or seen him hurt anybody. This testimony was substantiated by Victor Hardin who testified that he had known the defendant for five years at the farm and had never seen the defendant have any problems with anyone.

Joseph Michael O'Farrell, the brother of the victim, testified that the defendant had terminated his employment with the farm in approximately September of 1980 and that this

termination was due to the defendant's resignation, rather than his having been fired. Also, Mr. O'Farrell testified that the house in which his sister lived was owned by Ocala Stud, Incorporated. Mr. O'Farrell testified that he had examined the contents of the victim's residence at the time of her death and noticed that several valuable cameras, valuable antiques, etc. were not missing from the residence. However, there was testimony by Mr. O'Farrell that in going through the decedent's things he did run across her checkbook and it contained a check dated January 14, 1981 made payable to "Cash" in the amount of $150.00 indicating in parenthesis that it was for "Hialeah". Both Mr. O'Farrell and Detective LaTorre testified that the decedent had only $2.00 in her personal effects at the time of her death. Finally, Mr. O'Farrell testified that the check in question had been cancelled and had been found among the decedent's cancelled checks.

George Emerson Clark, a police officer for the City of Ocala, testified that on January 15, 1981, he had been so employed and had encountered the defendant at approximately 3:30 a.m. in a vehicle parked in an open field. At this time, Officer Clark noticed a pistol on the floor of the vehicle in which defendant was sleeping. The officer testified that the pistol which he noticed on this occasion (prior to the death of Nancy O'Farrell) was the same as that later taken from defendant and that the defendant admitted owning the pistol at the time. After running a negative warrant check on the defendant, Officer Clark decided to let the defendant continue to sleep in his vehicle in the field for the night. At no time did Officer Clark testify that the defendant made any furtive movements or otherwise cause him to fear for his safety and at no time did Officer Clark conduct a stop, frisk or search of defendant or his vehicle on this occasion.

James L. McGowan testified that he was employed as a patrolman

with the City of Ocala Police Department and was so employed on January 24, 1981. (Subsequent to the death of Nancy O'Farrell). At approximated 8:00 a.m. he was within the city limits of Ocala, Florida investigating a suspicious vehicle call. Commander Coley Campbell of the Ocala Police Department testified that from police department records the call had been made by a Mr. Jones around 7:43 a.m. on June 24, 1980, (Note: date clearly in error), reporting a black male who appeared to be asleep in a car at S.W. 1st Street and S.W. 23rd Avenue and the police dispatcher, in response to the call, had dispatched Officer McGowan to the scene. Officer McGowan testified that the suspicious vehicle dispatch did not necessarily connote to him suspicion of criminal activity.

On arrival at the scene Officer McGowan contacted the defendant, who appeared to be sleeping in a 1974 Chevrolet Chevelle. Officer McGowan testified that he asked the defendant for identification and that the defendant produced his driver's license for him. He did not recall where the driver's license was produced from. Officer McGowan then questioned the defendant about his address and was advised that it was the Ocala Stud Farm. He asked the defendant if he still lived there or was employed there or what, and the defendant advised him "no". The defendant advised him that his mother was in the hospital, and he asked if it was Monroe Regional Center. The officer testified that he had been on the scene approximately four to five minutes questioning the defendant when suddenly he became immediately concerned for his safety. He testified that the defendant had a blanket covering his right arm and right leg and his right arm was moving, and he felt in his mind that he was attempting to conceal something from him or reach for something. The officer testified that he did not recall the color of the blanket or how long or big it was. At the time he became concerned for his safety, Officer McGowan was requesting a computer check on the defendant by use of a portable radio outside his vehicle and still retained possession

of defendant's drivers license. The results of the check were negative and indicated that the defendant was not wanted by any law enforcement agency in the United States. At this point Officer McGowan asked the defendant to remove himself from his vehicle, which he did voluntarily. Officer McGowan proceeded to pat the defendant down. As he was patting the defendant down, he felt a hard object in his right jacket pocket and reached in and pulled out a .25 caliber RG gun. Furthermore, Officer McGowan testified that by this time his supervisor, Sgt. Becker, was in the immediate area and had arrived at the scene approximately two minutes after his arrival. Officer McGowan handed the gun to Sgt. Becker and arrested Mr. Lightbourne for carrying a concealed firearm. The pistol was transported to the Ocala Police Department, tagged and placed in an evidence locker. The automobile was released to a friend of the defendant, a Mr. Graham.

Under cross-examination at the suppression hearing, Officer McGowan admitted that the time of the incident in question he did not have a search warrant to search the defendant, nor his car, did not have an arrest warrant for the defendant, did not have consent to search the defendant, and that the defendant was not under arrest at the time he was searched. Also, he testified that at the time he arrived at the scene he did not feel that the defendant had committed a crime, was committing a crime, or was about to commit a crime. In addition, Officer McGowan testified that once he came in contact with the defendant he had no reason to believe that he was armed or dangerous. He also testified that, although he had obtained an identification card from the defendant and was in the process of calling for a computer search, the defendant was free to leave any time up to the point when he asked him to remove himself from the car. At no time did the defendant ask if he was free to go. Officer McGowan also testified under cross-examination that from the time he first arrived at the scene until he discovered the firearm approximately

ten to fifteen minutes had elapsed.

Immel Juan Becker testified that he was employed as a sergeant with the Police Department of the City of Ocala and had been so employed on January 24, 2981. He further testified that he also responded to the suspicious vehicle call as a supervisor to Officer McGowan, who was new on the force. Having first gone to the wrong address, Sgt. Becker arrived on the scene several minutes after Officer McGowan. This incident took place in a black residential area, according to Sgt. Becker. As he drove up, Officer McGowan was standing next to the driver's door of defendant's vehicle talking on a portable radio. As Becker stopped his car he observed the defendant moving with his upper body and it appeared to him as though the defendant was either trying to get something in a pocket or take something out. At this point he became concerned for both officers' safety and advised Officer McGowan to get the defendant out of the car.

On Motion to Suppress, Sgt. Becker testified that at the time he first observed the defendant fidgeting under the blanket he had reason to believe that he was armed. However, he further testified under cross-examination that at a prior deposition under oath he had answered he did not have reason to believe that the defendant was armed at that time.

Sgt. Becker observed Officer McGowan pat down the defendant and remove a weapon from his front jacket pocket. However, Sgt. Becker further testified that he could not state under oath that the gun which was removed from the defendant's pocket on that occasion was the same as that in evidence at the trial. Further, Sgt. Becker testified that he could not testify as to the color or texture of the blanket which allegedly covered the defendant. Also he did not know the whereabouts of said blanket at the time of the trial. Also, Sgt. Becker testified that the blanket covered the defendant's lap, both arms and legs, whereas Officer McGowan testified that the defendant's right arm and leg only were

concealed by the blanket. Sgt. Becker confirmed that the weapon removed from defendant was placed into evidence with the Ocala Police Department and that the vehicle was released to John Graham.

The defendant, Ian Lightbourne, testified at the Motion to Suppress. According to the defendant approximately twenty minutes had passed between the time Officer McGowan arrived and the time that he was ordered out of his car. He also testified that he advised Officer McGowan he had a gun in his jacket pocket and that he had at no time during the incident been covered by a blanket. Furthermore, he testified that he removed his wallet with his identification from his back pocket and produced it for Officer McGowan upon request. Also, he turned off a tape player that was playing in the car at Officer McGowan's request. Each of these incidents took place before the request by law enforcement officers that the defendant remove himself from the car.

While the defendant was incarcerated at the Marion County jail, one Theodore Chavers, a black male inmate, was moved from upstairs to downstairs in the jail and then next door to the same cell as that of the defendant. This transfer took place on Friday, January 29, 1981. The reason for the transfer, according to Chavers, was that there was no TV in his cell and Lightbourne's cell had a TV. Chavers testified that he had been told by Lightbourne that police investigators thought he (Lightbourne) might have killed Nancy O'Farrell because the murder weapon was the same as that which he had been carrying at the time of his arrest. Chavers further testified that Lightbourne told him he knew nothing of the murder and had, in fact, been in Jacksonville, Florida at the time of the murder. Chavers said he called Investigator LaTorre on Sunday, February 1, 1981, evening and told him about Lightbourne's discussing the death of the decedent. Later, on February 3, 1981, according to Chavers, police officers took the defendant for an interview at the communications office

Lightbourne was charged with the murder of Nancy O'Farrell. Chavers also testified to a later conversation with the defendant wherein he said the defendant admitted being in Nancy O'Farrell's house, although he did not state how he got there or why and that Ms. O'Farrell had come out of the shower and surprised him (Lightbourne). According to Chavers, the defendant recited to him that he (Lightbourne) told Ms. O'Farrell he wouldn't hurt her, had oral sex with her on the floor of her home, and that Ms. O'Farrell had a big vagina. Also, Chavers testified that Lightbourne told him he had had intercourse with Ms. O'Farrell. Chavers admitted that there had never been a conversation between he and Lightbourne with regard to the defendant's having stolen anything from the O'Farrell residence. Upon cross-examination, Chavers admitted that the defendant never said he killed Nancy O'Farrell and, in fact, at a later time told Chavers he did not kill her. The defendant repeatedly told Chavers he thought that the death had been a result of a professional hit job.

Chavers admitted that he had been given nineteen days early release from the sentence for which he was incarcerated in the Marion County jail and $200.00 for revealing the alleged facts as recited above to Investigator LaTorre. Investigator LaTorre indicated that Theodore Chavers had supplied him with other information relative to another trial and that the information was never confirmed. Also Investigator LaTorre indicated that Chavers gave the impression that he was expecting something in return for his information.

Another inmate of the Marion County jail, Theophilus Carson, real name James T. Gallman, testified that on February 18, 1981, he had shared a cell with the defendant and that he had revealed certain alleged conversations between he and the defendant to Investigator LaTorre on February 24, 1981. According to Carson, the defendant told him that he took money from Ms. O'Farrell and had sex with her, that he made her have sex with him and that he

had "messed up with her necklace". Carson admitted that no one in the jail had overheard this alleged conversation with the defendant.

On cross-examination, Carson admitted that he had served approximately 100 days in the Marion County Jail at the time of his alleged conversation with the defendant as a result of his having been charged accessory to grand theft. Also, Carson was released early from the Marion County jail eight days after he talked to Investigator LaTorre about his alleged conversation with the defendant.

As a result of the information obtained from Chavers and Carson and an interrogation of the defendant, Investigator LaTorre had the ballistics test mentioned above conducted. Also, he prepared an affidavit requesting a search of Defendant's vehicle and had it signed by a county judge. The vehicle was located at the private residence of a woman by the last name of Graham. Investigator LaTorre testified that as a result of the search he took into possession a black shoulder holster and an empty box that at one time had housed some .25 caliber automatic ammunition. He also noticed a little silver bank underneath the back of the front seat but did not seize it at that time. Furthermore, Investigator LaTorre testified that he obtained a second search warrant subsequent to the first, also issued by the same county judge. This was based upon the fact that one of the family members of the O'Farrell family advised Investigator LaTorre that the decedent had possessed a bank which was similar to the one he had previously observed in the vehicle. However, when he searched the vehicle the second time pursuant to the second warrant he did not locate the bank in question.

Finally, Investigator LaTorre testified that he served a search warrant upon the personal effects of the defendant at the Marion County jail, which warrant was authorized by Circuit Judge Sturgis. Pursuant to his warrant he did search the defendant's

personal effects in the Marion County jail located in the personal property section of the jail. At no time did Investigator LaTorre serve this search warrant on the defendant in his cell or on him in person. Taken from the defendant as a result of this search warrant was a pair of black leather gloves and a necklace. Defendant advised Investigator LaTorre he had purchased the necklace some time ago at a jewelry store in Hialeah. Mrs. Susan Greiner testified that she was the younger sister of the decedent and that her sister had been a member of the Alpha Omicron Phi sorority at the University of Florida. Mrs. Greiner identified the necklace as that of her sister due particularly to the presence of a religious medal on the back of the neclace. She testified that her sister had worn this necklace constantly until about two years ago when she received another necklace from a friend of hers. Anna O'Farrell testified that she was the older sister of the decedent and that she also recognized the necklace as that belonging to her sister. On cross-examination she testified it had been at least four to five years since she had seen her sister wear that necklace.

The Defendant, IAN DECO LIGHTBOURNE, exercised his rights under the Fifth Amendment to the United States Constitution and did not testify during the phase of the trial concerned with guilt or innocence.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION IN LIMINE AND MOTION TO SUPPRESS STATEMENTS ELICITED FROM PETITIONER BY "JAIL HOUSE INFORMERS"

As Justice Overton of the Florida Supreme Court recited in his dissenting opinion in the instant case, "the recent United States Supreme Court decision in United States v. Henry, 447 U.S. 264 (1980), mandates a reversal under the circumstances of this

case". Lightbourne v. State, 438 So.2d 380, 392 (Fla. 1983).

The facts upon which the petitioner relied in his Motion in Limine and Motion to Suppress are as follows:

Petitioner was arrested on January 24, 1981 on the charge of Carrying a Concealed Firearm. Counsel from the Public Defender's office was appointed on that day.

During his incarceration in the Marion County Jail, petitioner was placed in a cell with inmates Theophilus Carson and Theodore Chavers. Inmate Chavers was known to the Marion County Sheriff's Department as having aided the authorities in other cases.

On Sunday evening, February 1, 1981, Chavers called Fred LaTorre, Marion County Sheriff's Department Investigator and reported that his cellmate, the petitioner, was upset because the authorities believed that a gun similar to the one taken from him may have been used in the murder of Ms. O'Farrell. Investigator LaTorre instructed Chavers to gain further information from the petitioner.

From the period of February 1, 1981, to February 10, 1981, Chavers provided LaTorre with information he received from the petitioner. During that time, on February 3, 1983, the petitioner was arrested for the offense of first degree murder. After petitioner's arrest, and while represented by counsel, Chavers elicited the most incriminating of petitioner's statements.

The State presented Chavers and Carson as witnesses in the trial hereof and they testified as to conversations they had with the petitioner. Both witnesses were rewarded for the information they elicited from the petitioner. Chavers received two hundred ($200) dollars from the Marion County Sheriff's Department. Both Chavers and Carson had their periods of incarceration reduced at the behest of law enforcement and the State Attorney's office.

At all times subsequent to his incarceration on January 24, 1981, petitioner was represented by the Public Defender's office.

The facts outlined above constitute a violation of petitioner's Sixth Amendment right to counsel. Theodore Chavers and Theophilus Carson as informers paid by the state to elicit information from the petitioner were under the same constraints as any State agent. Therefore, any statements or admissions made by the petitioner to such agents in the absence of counsel and without a knowing and intelligent waiver of his Sixth Amendment rights are inadmissible as evidence.

The facts of this case are strikingly similar to those found in United States v. Henry, 447 U.S. 264 (1980). There, this Court was faced with the question of whether a Government agent "deliberately elicited" incriminating statements from Henry within the meaning of Massiah v. United States, 377 U.S. 201 (1964).

The agent in Henry, like Chavers in this case, had previously assisted law enforcement and was paid for providing the incriminating information related to him by his cellmate. In both Henry and the case at bar, law enforcement officials instructed the paid informers to "be alert to any statement made" and "keep your ears open", respectively. 447 U.S. at 269. Responding to the Government's contention that such instructions were not designed to affirmatively elicit information, this Court found that "Even if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result." 447 U.S. at 271.

This Court set out a three pronged analysis in Henry which it considered "important" in determining whether the incirminating statements were "deliberatley elicited". 447 at 270:

> First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

The facts of the case at bar fall squarely within such an analysis. Chavers and Carson were paid informants of the State

appearing to be nothing more than other cellmates to the petitioner. While petitioner was not under indictment at the time the information was elicited by the informants, the incriminating statements were made after his arrest, while in custody, and represented by counsel for the offfense of first degree murder.

As in Henry, the State intentionally created "a situation likely to induce (the petitioner) to make incriminating statements without the assistance of counsel", and as such, violated his rights under the Sixth Amendment to the United States Constitution. 447 U.S. 274. Petitioner maintains the trial court erred in denying his Motion in Limine and Motion to Suppress the statements elicited from him by the government agents absent presence of counsel and prays certiorari issue to review this contention.

II

CERTIORARI SHOULD BE GRANTED TO REVIEW THE CIRCUMSTANCES SURROUNDING THE INITIAL DETENTION OF PETITIONER TO DETERMINE WHETHER EVIDENCE OBTAINED AS A RESULT THEREOF SHOULD HAVE BEEN SUPPRESSED

Ocala Police Officers McGowan and Becker responded to a dispatched report of a suspicious vehicle at S.W. 23rd Avenue at S.W. 1st Street, Ocala, Florida and arrived at that location at approximately 8:00 a.m. on January 24, 1981. Sgt. Becker responded to the scene in his capacity as patrol supervisor and arrived a few minutes after Officer McGowan.

The caller who initially reported the "suspicious" vehicle to the police department did not describe the vehicle in question as to make, model, color, year or tag number.

The officers responding to the area did not know the make, model, color, year or tag number of the vehicle which was subject of the dispatch.

The caller who initially reported the "suspicious" vehicle to the police department did not describe the occupant or occupants of the vehicle as to sex, age, color, height, weight, clothing,

location within the vehicle or as to activity of such person.

The officers responding to the area did not know the sex, age, color, height, weight, clothing, location within the vehicle or previous activities of the occupant or occupants of the vehicle which was subject to the dispatch and were not informed as to the identity of the caller who originally reported the "suspicious" vehicle.

The vehicle and subject contacted by the officers were located in a predominately black residential neighborhood and the occupant of the vehicle in question was black.

The dispatch to the responding officers included no facts which would give rise to a well founded suspicion that a crime had been, was being, or was about to be committed.

The observation of the vehicle and its occupant did not create in the minds of either officer that a crime had been, was being, or was about to be committed. Upon request the vehicle's occupant produced proper identification and a reasonable explanation as to his presence at that location at that time.

It was determined at the scene, through radio communication to the officers that the accused was not wanted by any law enforcement agency and that the accused's vehicle was not stolen.

The accused presented the officers at the scene with a current driver's license and a current registration for his vehicle and after the accused had provided identification for himself and his vehicle and explained his presence to the officer, the officers ordered the accused to get out of his vehicle. At the time the accused was ordered from the vehicle, neither officer had a founded suspicion he had committed, was committing, or was about to commit a crime.

At no time subsequent to the intiial contact or prior to the pat-down search was the accused free to leave the area.

After the accused obeyed the order of the officer and removed himself from the vehicle, Officer McGowan conducted a pat-down

search which disclosed an object in the accused's pocket, which after removal by Officer McGowan was identified as a .25 caliber automatic pistol.

The detention and pat-down search of the accused at all times pertinent hereto was accomplished without benefit of a warrant to either arrest or search the accused.

Thus, the detention and pat-down search violated legislative pronouncement in this area, to-wit: Florida Statute 901.151 as to both the letter and spirit of such law and the Fourth, Sixth and Fourteenth Amendments of the Constitution of the United States, as will be more fully discussed herein.

All the evidence set forth above was discovered and seized as a direct result of the initial detention which combined to produce the poison tree that this Court warned of in Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

All the evidence listed in the motion was seized as a direct result of the unlawful detention and frisk herein and as such should have been suppressed from use in evidence.

But for the illegal detention, there would have been no frisk.

But for the illegal frisk, the .25 caliber automatic revolver would not have been recovered.

But for the illegal seizure of the .25 caliber automatic revolver there would be no lab tests sugegsting that this was the gun used to kill Nancy O'Farrell.

But for the lab results indicating this particular weapon was used to kill Nancy A. O'Farrell, no search warrant would have been issued for the accused's vehicle.

But for the issuance of a search warrant for the accused's vehicle, evidence therefrom could not have been legally seized.

But for the lab results indicating this particular weapon was used to kill Nancy A. O'Farrell, no search warrant would have been issued for the personal property of the accused held at the Marion County jail.

But for the issuance of a search warrant for the personal property of the accused held at the Marion County jail, evidence therefrom could not have been legally seized.

But for the recovery of any and all evidence heretofore mentioned, the accused could not have been arrested for any criminal violation.

But for the recovery of any and all evidence heretofore mentioned, the accused could not have been arrested for Carrying a Concealed Firearm, or charged with that offense.

But for the recovery of any and all evidence heretofore mentioned, the accused could not have been indicted by the Grand Jury for the first degree murder of Nancy A. O'Farrell.

But for the recovery of any and all evidence heretofore mentioned, the accused could not have been arrested for the first degree murder of Nancy A. O'Farrell.

But for the arrest of a charge of Carrying a Concealed Firearm, the accused would not have been in custody at the Marion County jail prior to February 3, 1981.

But for the arrest on a charge of the first degree murder of Nancy A. O'Farrell, the accused would not have been in custody at the Marion County jail subsequent to February 3, 1981.

But for the detention of the accused at the Marion County jail, State witnesses Theodore Chavers and Theophilus Carson would have had no custodial contact with the accused from which testimony of "purported" statements could arise.

But for the unlawful stop and frisk herein, no criminal charges would have been filed against the accused.

As a basis for petitioner's arguments cited above, this Court should consider certain Constitutional matters in determining whether this particular "stop and frisk" was permissible under the law.

A The "Stop".

Florida Statute §901.151 was enacted by the Florida

Legislature subsequent to the decision of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). It has been suggested by many that F.S. §901.151 was simply the Florida Legislature's codification of the opinion in Terry.

Since F.S. §901.151 was enacted this Court had occasion to revisit and expound on Terry in Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). It should be noted that Justices Brennan, Douglas and Marshall dissented in Adams, feeling that any broadening of Terry was necessarily unconstitutional. Adams' major expansion of the Terry doctrine was its holding that reasonable cause for a stop need not be based on an officer's personal observations.

Justice Marshall in the Adams dissent cited basic principles of constitutional law from Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) which must be dealt with in resolving every search issue:

> "The most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well delineated exceptions.' The exceptions are jealously and carefully drawn and there must be 'a showing' by those who seek exemption...that the exigencies of the situation made that course imperative. 'The burden is on those seeking the exemption to show the need for it'."

The Adams decision expanded the jealously drawn exception to the constitutional warrant requirement established in Terry. Adams allowed a Terry detention based on the facts of that case alone and recognized there could be cases where reasonable cause for stop could be based on information provided by a known-to-be-reliable informant.

Adams did not alter F.S. 901.151, and Adams did not alter the substance of Terry, which continues to hold:

> "...a policeman making a reasonable investigatory stop may conduct a limited protective search for concealed weapons WHEN he has REASON TO BELIEVE that the suspect is armed AND dangerous." (emphasis added)

The majority holding in Adams is the law of the land. It is not the last expression of the law in this area. The Fifth Circuit Court of Appeals had occasion to deal with a stop and

frisk based on information supplied by an unnamed informant in U.S. v. McLeroy, 584 F.2d 746 (5th Cir. 197). The McLeroy opinion dealt with the reliability of the information to justify the reasonable suspicion for the stop. The Court made the following rulings:

> An officer may stop a driver of an automobile if he reasonably concludes that criminal activity is afoot; and
>
> In some cases cooroboration by the officer of innocent detail supplied by an unnamed informant might change an otherwise unsubstantial tip into a proper basis for reasonable suspicion of criminality to justify investigatory stop; but
>
> Where, as in McLeroy, the officer observed nothing suspicious and the only information supplied by the informant and corroborated by the officer was the accused's name, address, and description of automobile, REASONABLE SUSPICION THAT CRIMINAL ACTIVITY WAS AFOOT DID NOT EXIST TO JUSTIFY THE STOP. (emphasis added)

Before such a stop is justified the officer must reasonably conclude in light of his experience that criminal activity may be afoot. More specifically the officer must be able to point to specific and articulable facts which taken together with reasonable inferences from those facts justify the threshold stop. McLeroy citing; Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 30 L.Ed.2d 612 (1972); U.S. v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d (1975); U.S. v. Hall, 557 F.2d 1114 (5th Cir. 1977) cert. den. 434 U.S. 907, 98 S.Ct. 308, 54 L.Ed.2d 194 (1977).

The McLeroy decision recognized that corroboration of innocent detail by the officer, coupled with his personal observation of apparently lawful activity, cannot justify the initial stop. Naturally, where the stop is not justified, the frisk cannot be justified and all evidence seized must be suppressed The essence of McLeroy is stated in the last sentence of the opinion where the Court states:

> "Reasonable suspicion requires more than this minimal corroboration of innocent detail." U.S. v. Devita, 526 F.2d 81 (9th Cir. 1975)

This principle of law was reiterated by the Fifth Circuit Court more recently in U.S. v. Rasor, 599 F.2d 1330 (5th Cir. 1979).

This Court has had opportunities to deal with "stop and frisk" matters since Adams. In Ybarra v. Illinois, 100 S.Ct. 338 (1979), interesting observations by the majority in that case are as follows:

> "The Terry case created an exception to the requirement of probable cause, an exception whose 'narrow scope' this Court has been careful to maintain."
>
> (Under Terry)"...an officer, for his own protection and safety may conduct a pat down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted."
>
> "Nothing in Terry can be understood to allow a generalized 'cursory search for weapons'..."
>
> "The 'narrow scope' of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked..."

In Dunaway v. New York, 99 S.Ct. 2248, 60 L.Fd.2d 824 (1979) this Court recognized that before Terry, the requirement of probable cause was an absolute prerequisite to a seizure.

Probable cause is defined as 'the facts and circumstances within their knowledge and of which they had reasonable caution in the belief that an offense has been committed'. Brinegar v. U.S., 338 U.S. 160, 69 S.Ct. 1302, 93 L.Fd. 1879 (1949). The Dunaway decision recognized "probable cause" as:

> "the best compromise that had been found accomodating the often opposing interests in safeguarding citizens from rash and unreasonable interferences with privacy and in seeking to give fair leeway for enforcing the law in the community's protection."

Though Dunaway acknowledges that "Terry" detentions do not require full blown probable cause, Terry detentions are serious constitutional infringements, to-wit:

> "...even this type (Terry detention) of necessarily swift action predicated upon the on-the-spot observations of the officer on the beat, constituted a serious intrusion upon the sanctity of the person which may inflict great indignity and arouse stong resentment."

The Dunaway decision held that because Terry involved an exception

to the general rule requiring probable cause courts should be careful to maintain its narrow scope. This Court established a narrowly drawn authority to permit a reasonable search for weapons where the officer has reason to believe that he is dealing with an armed AND dangerous individual.

In footnote 11 of Dunaway, this Court referred again to the very limited nature of Terry, stating that the statement that a police officer believed that his safety or that of others was in danger must be objectively reasonable based on time by the more detached, neutral scrutiny of a judge.

Dunaway continues to stress the importance of the Fourth Amendment by its reference to Henry v. U.S., 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959) which held hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' were not adequate to support a warrant..."

Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 679 (1969) which was decided after Terry and cited with approval in Dunaway, warned:

> "To argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ingnominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether those intrusions be termed 'arrests' or 'investigatory detentions'."

This Court has recently attempted to establish a test by which the validity of a stop and frisk can be measured. Three recent cases dealt with whether reasonable suspicion for an investigatory stop existed. In United States v. Mendenhall, 446 U.S. 544 (1980), three justices found there to have been a "seizure" in an airport terminal detention but found reasonable suspicion, emphasizing that for a trained law enforcement agent reasonable suspicion can be based on knowledge of methods of

criminal activity, knowledge of the personal characteristics of those involved, and knowledge of the particular area. None of these factors seem to have been present in the instant case, however. Additionally, in Reid v. Georgia, 448 U.S. 438 (1979), this Court refused to accept a drug courier profile and totally innocent behavior as reasonable suspicion. Finally, in United States v. Cortez, 101 S.Ct. 690 (1981), this court emphasized:

> "an investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity". 101 S.Ct. at 695.

The Court pointed out that the totality of the circumstances must be considered in assessing this objective manifestation, including:

1. Objective observations of the officers.
2. Information from police reports.
3. Operational patterns of certain kinds of suspects.
4. Geographic area characteristics.
5. Logical inferences based on all of the above.

None of these factors were present to any extent in the instant case.

B. The "Frisk".

If the initial stop is invalid then all evidence that flows therefrom is illegally obtained. Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Each stop must be evaluated on the particular facts, circumsances and reasonable inferences therefrom known to the officer either from his own personal observations or from reliable second hand information prior to such stop. If the stop is not legally justifiable all evidence must be suppressed.

Only after a legally justifiable stop need one address the problem of the legality of the frisk. Assuming arguendo a stop is valid then the officer must have probable cause to believe the detainee is both armed and dangerous.

Unless the stop is based on well founded suspicion and the frisk based on probable cause to believe the detainee is both armed and dangerous, all evidence resulting therefrom must be suppressed.

C. The "Seizure".

This Court has had recent occasion to discuss when the detention or seizure of a person occurs in United States v. Mendenhall, 446 U.S. 544 (1980). Therein, Justices Stewart and Rhenquist, in a split 2-3 majority opinion, defined seizure as "when by means of physical force or a show of authority, (a citizen's) freedom of movement is restrained." 445 U.S. at 553. Both Justices state as long as someone who is being questioned believes he is free to leave, there has been no intrusion upon a person's liberty. However, the test under the circumstances is an objective one; whether a reasonsable person under the circumstances would have believed that he was not free to leave. This majority opinion has been adopted by the Georgia Supreme Court in State v. Reid, 247 Ga. 445, 276 S.E.2d 617 (1981). Thus, in the instant case, under the definition of Mendenhall, the defendant was not only subject to a stop and frisk but an unconstitutional seizure of his person as well. No reasonable person could assume Lightbourne was free to leave Officer McGowan's presence at a time during which the officer had his (defendant's) driver's license in hand and was conducting a radio warrant check regarding him.

The Court's most recent decision in this area, Florida v. Royer, 103 S.Ct. 1319 (1983), presented a question of whether the bounds of an investigative stop had been exceeded so as to render the resulting search unconstitutional. That case involved narcotics agents stopping an individual fitting the so-called "drug courier profile." Upon request, but without oral consent, Royer produced his drivers license and airline ticket. The agents retained the license and ticket, asked him to accompany them to another room, and conducted a "consensual" search of his luggage.

This Court found that, although the initial request and examination of the ticket and license were permissible, the agents' activities "while retaining his ticket and drivers license and without indicating in any way that he was free to depart effectively seized Royer for the purposes of the Fourth Amendment". 103 S.Ct. at 1326. This Court went on to hold that such circumstances amounted to a show of official authority such that a reasonable person would have believed he was not free to leave. Id.

In the case at bar, the police officer requested and retained petitioner's drivers license admittedly without any of the suspicion of criminal activity found in Royer. And while the policeman testified petitioner was free to leave during that period, it is unreasonable that a layman would entertain such a belief while a law enforcement agent is in possession of his drivers license. Indeed, it would be unlawful in Florida for petitioner to have driven away without his license.

Furthermore, in general, courts have held that where, however, modest and limited initial restraint lasts beyond the few moments necessary to ask a few questions, the Fourth Amendment requires that probable cause exists if such continued detention is to be legal. A case which is, in some respects, on-all-fours with the instant case is United States v. Chamberlin, 609 F.2d 1318 (9th Cir. 1979). Therein, an officer who was familiar with the defendant's extensive criminal record saw him and a companion, who also had an extensive record, flee as they saw the officer. The defendant was stopped-and lawfully so-according to the court. He gave an evasive answer to the officer's initial questions, so he was placed in a patrol car. He remained there for almost 20 minutes as the officer sought to find the companion and investigate further. Although the court commended the officer's actions as "reasonable, good faith police work," it found the defendant's detention to have been unconstitutional, because no

probable cause to arrest existed. This same restraint without probable cause is present in the instant case.

III

CERTIORARI SHOULD BE GRANTED TO REVIEW THE AGGRAVATING-MITIGATING CIRCUMSTANCES BALANCE AND TO DETERMINE THAT DEATH IS NOT AN APPROPRIATE CONSTITUTIONAL PUNISHMENT IN THE INSTANT CASE

Once it is established that the informants were agents of the State (See I), which requires suppression of the statements made by petitioner to the informants in the absence of Miranda warnings, the aggravating circumstances found by the trial court require additional review. Such statements acquired in violation of petitioner's Six Amendment rights are inadmissible at a capital sentencing proceeding. Estelle v. Smith, 451 U.S. 454 (1981).

AGRAVATING CIRCUMSTANCES

1. The capital felony was committed while the defendant was engaged in the commission of a burglary and sexual battery. The only evidence which directly established this circumstance centers around alleged statements of the defendant to the government informants with reference to the fact that during the burglary the victim was forced into acts of oral sex and intercourse as she begged the defendant not to kill her. Each of these facts as outlined in the majority opinion of the Supreme Court of Florida are established only by testimony of the unreliable informants in violation of petitioner's Six Amendment right to counsel. There was no eyewitness to the crime in question, and the defendant did not confess or testify in the instant case.

2. The capital felony was especially heinous, atrocious, or cruel. Again, the majority of the Supreme Court of Florida states in its opinion that the victim was forced to submit to sexual relations with the petitioner prior to her death while pleading for her life. The only proof of these allegations at trial stems from testimony of unreliable informants in violation of petitioner's Sixth Amendment right to counsel.

Thus, at lease two of the aggravating circumstances in the instant case are based upon nothing but testimony of jailhouse informants. When compared to the mitigating circumstances, not engaging in merely a counting contest, State v. Dixon, 283 So. 2d 1 (Fla. 1973), it is apparent that this case is not one that would support a penalty of death.

Respectfully submitted,

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been ignored, it appears that the evidence was considered and rejected. The trial judge need not have expressly addressed each non-statutory mitigating factors in rejecting the same, and we will not disturb his judgment simply because appellant disagrees with the conclusions reached.

Because no issue has been raised which warrants reversal of appellant's conviction or sentence, the same are hereby affirmed.

It is so ordered.

ALDERMAN, C.J., and BOYD and EHRLICH, JJ., concur.

OVERTON, J., Concurs in the conviction, but concurs in the result only to the sentence.

McDONALD, J., concurs in part and dissents in part with an opinion.

McDONALD, Justice, concurring in part, dissenting in part.

I concur in the conviction and all that is said in conjunction thereto, but I would remand for a new sentencing order. The trial judge clearly erred in holding that this homicide was a great risk of danger to many persons. I also disagree with his and the majority's finding that it was proved beyond a reasonable doubt that the homicide was committed in a cold, calculated, and premeditated manner. Since there appears some evidence in mitigation relative to the defendant's ignorance, dull mental capacity, and the history of his childhood, and being unable to say with certainty that the sentencing judge would impose the death penalty when he is unaided by the improper aggravating findings, the present sentence should be vacated with instructions to the trial judge to resentence the defendant.

Ian LIGHTBOURNE, Appellant,

v.

STATE of Florida, Appellee.

No. 60871.

Supreme Court of Florida.

Sept. 15, 1983.

Rehearing Denied Oct. 26, 1983.

Defendant was convicted in the Circuit Court, Marion County, William T. Swigert, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, Adkins, J., held that: (1) indictment was sufficient to charge murder in the first degree and was not impermissibly vague; (2) defendant's cellmate who testified against defendant at trial was not acting as a paid informant for the Government and thus his testimony regarding statements made by the defendant was properly allowed into evidence; (3) statements made by defendant during interrogation were freely and voluntarily made; and (4) trial court did not err in imposing death sentence upon the defendant in accordance with the advisory recommendation of the jury.

Affirmed.

McDonald, J., concurred in conviction, but dissented from sentence.

Overton, J., filed dissenting opinion.

1. Indictment and Information ⇐87(7)

It is not necessary that indictment or information state exact date of offense if such date is not known; indictment or information in such cases will be deemed sufficient if it is alleged that offense occurred within stated specific time limits. West's F.S.A. RCrP Rule 3.140(d)(3).

2. Indictment and Information ⇐87(7)

Indictment sufficiently charged time of offense and notified defendant of time of murder as specifically as possible where scientific experts could only narrow time of victim's death to a 22½-hour time period. West's F.S.A. RCrP Rule 3.140(d)(3).

3. Indictment and Information ⇐144.1(1)

Indictment or information will be dismissed for vagueness only if it is so vague, indistinct, and indefinite so as to mislead defendant or embarrass him in preparation of his defense or expose him after conviction or acquittal to substantial danger of new prosecution for same offense. West's F.S.A. RCrP Rule 3.140(o).

4. Indictment and Information ⇐110(17)

Allegations of indictment which tracked statute were sufficient to charge murder in first degree regardless of whether murder was committed with premeditated design or in perpetration of enumerated felonies of burglary and sexual battery; consequently, indictment was not vague or overbroad since it specifically apprised defendant of criminal acts allegedly committed which supported charge. West's F.S.A. § 782.04.

5. Homicide ⇐142(1)

Indictment which clearly incorporated allegation that murder was premeditated in design was not defective on theory that it charged only felony murder and that charging only felony murder and proving premeditated murder is impermissible.

6. Criminal Law ⇐1208.1(6)

Aggravating circumstances to be applied at sentencing stage in capital felony cases need not be originally alleged in indictment in order to confer jurisdiction on court to impose sentence of death.

7. Constitutional Law ⇐52

Statute which fixes penalties for capital felony convictions does not infringe on principle of separation of power or eliminate judicial discretion at sentencing stage since determination of maximum and minimum penalties is matter for legislature. West's F.S.A. § 775.082.

8. Constitutional Law ⇐52

When statutory sentence is not cruel and unusual on its face, it will be upheld against attack based on separation-of-powers grounds.

9. Criminal Law ⇐1206.1(1)

Aggravating and mitigating circumstances contained in sentencing statute are not impermissibly vague or overbroad but rather provide meaningful restraints and guidelines for discretion of judge and jury. West's F.S.A. § 921.141.

10. Criminal Law ⇐1206.1(1)

Mitigating factors contained in sentencing statute are not constitutionally deficient because limited by statute, since all relevant factors have been authorized to be presented in mitigation at sentencing phase of proceedings. West's F.S.A. § 921.141(6).

11. Criminal Law ⇐1206.1(2)

Death penalty statutes are not unconstitutional. West's F.S.A. §§ 775.082, 782.04(1)(a); U.S.C.A. Const.Amend. 14.

12. Criminal Law ⇐412.1(2), 641.12(1)

Defendant's cellmate was not acting as agent of State during time he shared cell with defendant at county jail, and thus statements made by defendant to cellmate were not obtained in violation of defendant's constitutionally guaranteed privilege against self-incrimination and his right to counsel, where there was nothing in record establishing that cellmate had any prearranged guarantee of money in return for information, and money he received from sheriff's department was drawn from general reward fund and was not given as inducement to elicit information; detective's advice to informant to keep his ears open did not constitute attempt by State to deliberately elicit incriminating statements. West's F.S.A. Const. Art. 1, § 12; U.S.C.A. Const.Amends. 5, 6.

13. Searches and Seizures ⇐7(12)

Taking into custody by police of property of arrested persons for safekeeping does not violate constitutional search and seizure protections. U.S.C.A. Const.Amend. 4.

14. Searches and Seizures ⇐7(10)

After person allows his personal effects to be taken into custody by police and inventoried, any privacy interest previously attached thereto is dissipated.

15. Searches and Seizures ⇐7(12)

Inventory of defendant's belongings, occurring incident to lawful arrest, did not constitute unreasonable search; subsequent inspection of belongings by police officer at jail caused no greater intrusion than original inventory, and since belongings had already been exposed to police view under lawful circumstances, inspection did not breach defendant's privacy interest in his belongings since any such right previously existing was relinquished by defendant when he originally acquiesced in inventory.

16. Arrest ⇐63.5(6)

While defendant was correct in his assertion that officers who stopped him had no probable cause or well-founded suspicion that he was about to commit or had committed any crime, showing of probable cause was not necessary where police officers were responding to call by citizen to investigate suspicious car and were not acting on their own hunch, and stop did not constitute unlawful intrusion.

17. Arrest ⇐63.5(7)

There exists distinction between intrusion by police amounting to "seizure" of person and encounter which intrudes upon no constitutionally protected interest.

18. Arrest ⇐63.5(8)

Where initial contact between defendant and police officer was justified, ultimate pat-down was also justified in that defendant's furtive movements and nervous appearance when observed by police officer formed reasonable ground to believe that defendant was armed and potentially dangerous; officer acted with prudence and was entitled to execute limited search for weapons.

19. Criminal Law ⇐412.2(5)

Inquiry made by defendant as to whether he had to continue his interview was not reassertion of his *Miranda* rights requiring second waiver of those rights where defendant knew of his right to end interrogation and did in fact end interrogation at later time by stating that he wished to say nothing further.

20. Criminal Law ⇐412.1(1)

Even if defendant, in asking whether he had to continue with interrogation, did reassert his right to remain silent, his voluntary resumption of answering interviewers' questions without any coercive measures being taken by interviewing officers to induce further testimony evidenced second knowing waiver.

21. Criminal Law ⇐412.2(5)

Express statement by accused that he fully understands and waives his *Miranda* rights is not necessary for valid waiver of those rights; waiver may be shown by attendant circumstances and by actions of accused; this is as true midinterview as it is at interview's inception.

22. Criminal Law ⇐627.8(6)

Motion to impose sanctions for state's failure to properly notify defendant of deposition to be taken of listed state witness is properly addressed to discretion of trial court. West's F.S.A. RCrP Rule 3.220(j).

23. Criminal Law ⇐627.8(6)

Trial court's decision not to impose sanctions, for failure to properly notify defendant of deposition to be taken of State's witness, greater than admonishment of both parties was not abuse of discretion especially where defendant's admitted motivation for filing motion for sanctions was to ensure that all future depositions would be properly noticed. West's F.S.A. RCrP Rule 3.220(j).

24. Criminal Law ⇐1208.1(6)

Sentencing procedure is not merely counting contest in which number of aggravating factors is compared to number of mitigating factors, with all factors having equal weight, but rather process involves reasoned judgment as to which factual circumstances weigh heavily toward or against imposition of death penalty.

25. Criminal Law ⇐1208.1(6)

Trial court's failure to find unenumerated mitigating factor of defendant's previous lack of violent history was not error where defendant's lack of past history of

violence was not proved and strength of aggravating circumstances would have supported imposition of death penalty even had defendant's lack of past violent history been found as mitigating factor. West's F.S.A. § 921.141(6)(a, g).

26. Homicide ⇐354

Evidence which was sufficient to support findings of burglary and sexual battery was also sufficiently strong to support finding as aggravating circumstance that murder was committed while defendant was engaged in commission of sexual battery and to support finding of premeditated design. West's F.S.A. § 921.141(5)(d).

27. Homicide ⇐354

Evidence that defendant admitted knowing victim was sufficient to support finding as aggravating circumstance that murder was committed for purpose of avoiding or preventing lawful arrest. West's F.S.A. § 921.141(5)(e).

28. Homicide ⇐354

Evidence was sufficient to support finding as aggravating circumstance that murder was committed for pecuniary gain; consideration of murder for pecuniary gain and murder while engaged in burglary was not doubling of aggravated circumstances. West's F.S.A. § 921.141(5)(f).

29. Homicide ⇐354

Evidence was sufficient to support finding as aggravating circumstance that murder was especially heinous, atrocious, or cruel where murder and events leading up to its consummation were unnecessarily torturous of victim. West's F.S.A. § 921.141(5)(h).

30. Homicide ⇐354

Evidence was sufficient to support finding as aggravating circumstance that murder was committed in cold, calculated, and premeditated manner without any pretense of moral or legal justification where defendant cut phone lines, entered house at time when others would most likely not be present, and effected execution-style killing using pillow placed between murder weapon and victim's head. West's F.S.A. § 921.141(5)(i).

31. Homicide ⇐354

Trial court in first-degree murder prosecution did not err in imposing death sentence in accordance with advisory recommendation of jury.

Jerry T. Lockett, Sp. Asst. Public Defender, Tavares, for appellant.

Jim Smith, Atty. Gen., and Sean Daly, Asst. Atty. Gen., Daytona Beach, for appellee.

ADKINS, Justice.

We have for review a judgment of conviction and a sentence of death imposed by a trial court. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant, Ian Lightbourne, was convicted of first-degree murder and as recommended by the jury, was sentenced to death. By appeal he seeks a reversal of his conviction and his sentence. For the reasons set out below we affirm both appellant's conviction and the sentence of death imposed upon him. The facts are complex and will be recited together with their respective issues which appellant raises on appeal.

I.

The indictment reads in part:

[T]hat IAN LIGHTBOURNE of the County of Marion and State of Florida, on the 16th or 17th day of January, 1981, in the County and State aforesaid, did unlawfully, from a premeditated design to effect the death of a human being and/or while engaged in the perpetration of a burglary and/or involuntary sexual battery, kill and murder Nancy A. O'Farrell, a human being, by shooting her with a firearm, to-wit: a .25 caliber automatic pistol, a more particular description being to this Body unknown, in violation of Florida Statute 782.04.

[1] Appellant's (hereinafter defendant) initial claim is that the indictment does not

allege the time of the offense "as definitely as possible" under Florida Rule of Criminal Procedure 3.140(d)(3). However, it is not necessary that an indictment or information state the exact date of the offense if such date is not known. Rather the indictment or information in such cases will be deemed sufficient if it is alleged that the offense occurred within stated specific time limits. *Sparks v. State*, 273 So.2d 74 (Fla.1973); *State v. Bandi*, 338 So.2d 75 (Fla. 4th DCA 1976), *cert. denied*, 344 So.2d 323 (Fla.1977).

The statement of particulars given by the state narrowed the time period for the alleged offense to sometime between 5:30 p.m. on January 16, 1981, and 4:00 p.m. on January 17, 1981. Furthermore, this time frame was based on scientific evidence obtained at the crime scene and during the subsequent autopsy and later presented at trial. Scientific experts could only narrow the time of death to approximately midnight of January 16, 1981.

[2] Given the limited information possessed by the state relative to the time of death of the decedent, the indictment sufficiently charged the time of the offense and notified the defendant of the time of the murder as specifically as possible. As such, the trial court did not err in denying the defendant's motion to dismiss the indictment on this ground. Fla.R.Crim.P. 3.140(d)(3).

The defendant also challenges the indictment on grounds of overbreadth and vagueness, arguing that the state, by charging in the disjunctive in this case, has effected the result of charging two inconsistent offenses, that is felony murder and premeditated murder.

[3] An indictment or information will be dismissed for vagueness only if it is so vague, indistinct and indefinite so as to mislead a defendant or embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense. *State v. Dilworth*, 397 So.2d 292 (Fla.1981); *State v. Black*, 385 So.2d 1372 (Fla.1980); Fla.R.Crim.P. 3.140(o).

Under section 782.04, Florida Statutes (1981), the offense of first-degree murder may be committed in several ways, including murder by premeditated design or a felony murder supported by various felonies, among which are included the felonies of burglary and sexual battery. The instant indictment tracked the statute and adequately placed the defendant on notice that he was charged with first-degree murder resulting from any one or a combination of the three specific methods in the indictment. The single offense of first-degree murder may be proven by alternate methods, so it follows that the charging instrument should be free to include such alternate bases for conviction.

[4] The allegations of the indictment are sufficient to charge murder in the first degree, regardless of whether the murder was committed with premeditated design or in the perpetration of the enumerated felonies. *Knight v. State*, 338 So.2d 201 (Fla. 1976); *Barton v. State*, 193 So.2d 618 (Fla. 2d DCA 1966), *cert. denied*, 201 So.2d 459 (Fla.1967). Consequently, the indictment was not vague or overbroad since it specifically apprised the defendant of the criminal acts allegedly committed which support the charge of first-degree murder.

[5] The defendant's final challenge under Point I is that the indictment could be construed as charging only felony murder and that charging only felony murder and proving premeditated murder is impermissible under *Ables v. State*, 338 So.2d 1095 (Fla. 1st DCA 1976), *cert. denied*, 346 So.2d 1247 (Fla.1977). The indictment herein clearly incorporates an allegation that the murder was premeditated in design. The *Ables* decision involved a case in which premeditated murder was never alleged, and as such that case is clearly distinguishable from the instant case.

II.

The defendant claims that the trial court erred in denying his second motion to dismiss the indictment, arguing that the aggravating circumstances to be applied at

the sentencing stage in capital felony cases must be originally alleged in the indictment in order to confer jurisdiction on a court to impose a sentence of death. If such allegations are not made, argues the defendant, death is not a permissible penalty, for it is now established that the sentencing process, as well as the trial itself, must satisfy the requirements of due process. *See, Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

[6] The defendant's arguments raised under Point II are clearly without merit, having been previously addressed and rejected in *Sireci v. State*, 399 So.2d 964 (Fla. 1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). The trial court did not err in denying the defendant's motion to dismiss the indictment or to declare that death was not a possible penalty.

III.

The defendant raises a number of constitutional challenges to sections 775.082(1), 782.04(1), and 921.141, Florida Statutes, (1981). Such challenges for the most part have been previously considered and disposed of by this and other courts.

[7, 8] First, the defendant claims that section 775.082, by fixing the penalties for capital felony convictions, infringes on the principle of separation of power, eliminates judicial discretion at the sentencing stage, and is therefore unconstitutional. This argument is clearly misplaced. The constitutionality of this section has been repeatedly upheld. *Antone v. State*, 382 So.2d 1205 (Fla.), *cert. denied*, 449 U.S. 913, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980); *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976); *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Additionally, the determination of maximum and minimum penalties is a matter for the legislature. Also, when a statutory sentence is not cruel and unusual on its face it will be upheld against an attack based on separation of powers grounds. *Sowell v. State*, 342 So.2d 969 (Fla.1977).

[9] Second, the defendant attacks the constitutionality of section 921.141, arguing that the aggravating and mitigating circumstances contained in the statute are impermissibly vague and overbroad. This Court has ruled on numerous occasions upholding the constitutionality of the section, finding that the statutorily prescribed circumstances were not vague but rather provided "[m]eaningful restraints and guidelines for the discretion of judge and jury." *State v. Dixon*, 283 So.2d at 9. Subsequent decisions buttress the constitutionality of the statute. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); *Foster v. State*, 369 So.2d 928 (Fla.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 116 (1979); *Alvord v. State*.

[10] The defendant's claim that the mitigating factors contained in section 921.141(6) are constitutionally deficient because limited by statute is without merit. In *Sireci v. State* and *Songer v. State*, 419 So.2d 1044 (Fla.1982), all relevant factors were authorized to be presented in mitigation at the sentencing phase of the proceedings.

[11] Finally, the defendant asks this Court to reverse its position on the constitutionality of Florida's death penalty statutes, sections 782.04(1)(a) and 775.082. This we decline to do. These statutes have been repeatedly upheld against claims of denial of due process and equal protection, as well as against assertions that they constitute cruel and unusual punishment. *Proffitt v. Florida; Spinkellink v. Wainwright; Ferguson v. State*, 417 So.2d 639 (Fla.1982); *Songer v. State, Booker v. State*, 397 So.2d 910 (Fla.), *cert. denied*, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981); *Antone v. State; Foster v. State; Martin v. State*, 377 So.2d 706 (Fla.1979); *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); *Alford v. State*, 307 So.2d 433 (Fla.1975), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49

L.Ed.2d 1221, *Alvord v. State; Swan v. State*, 322 So.2d 485 (Fla.1975); *State v. Dixon*. The defendant has failed to establish or demonstrate that this Court's position on the death penalty statutes should be disturbed.

Accordingly, we hold that the trial court did not err in denying the defendant's motion to declare sections 775.082(1), 921.141 and 782.04(1) unconstitutional.

IV.

Defendant's basic claim under Point IV is that Theodore Chavers, a state witness at trial, was acting as an agent of the state during the time he shared a cell with the defendant at the Marion County jail. Consequently defendant argues that any statements made by him to Chavers should have been suppressed in that the defendant was unaware that he was talking to a government agent, and such statements were obtained in violation of his constitutionally guaranteed privilege against self incrimination and his right to counsel. U.S. Const. amend. V and VI; Art. I, § 12, Fla. Const.

The threshold inquiry here is whether or not Theodore Chavers was acting as an agent of the state. In *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), the Supreme Court held that sixth amendment rights were violated when:

> [T]here was used against [the defendant] at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.

Id. at 206, 84 S.Ct. at 1203.

In *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the Supreme Court applied *Massiah* in the context of using informant information and apparently recognized an active/passive dichotomy in determining whether or not an informant is to be deemed acting as an agent of the state in any particular case. The key to the *Henry* decision lies in the requirement that in order for an informant to be acting as a state agent he must, acting in concert with the state, actively stimulate or instigate conversation specifically designed to elicit incriminating information. If no active role is taken by the informant, but rather he merely remains passive and keeps his ears open for anything the defendant might wish to volunteer, then under the *Henry* analysis there is no agency relationship which would trigger the fifth and sixth amendment protections.

[12] In *Henry* the Court found that the informant, Nichols, was acting under instructions as a paid informant for the government. In return for information he was given money and this arrangement was mutually understood. In the instant case there is nothing in the record establishing that the informant Chavers had any prearranged guarantee of money in return for information, and it appears that the two hundred dollars that he did receive from the Marion County Sheriff's Department was drawn from a general reward fund and not given as an inducement to elicit information.

Similarly, Investigator LaTorre's advice to the informant Chavers to keep his ears open does not constitute an attempt by the state to deliberately elicit incriminating statements. Without some promise or guarantee of compensation, some overt scheme in which the state took part, or some other evidence of prearrangement aimed at discovering incriminating information we are unwilling to elevate the state's actions in this case to an agency relationship with the informant Chavers.

The informant Chavers' testimony regarding statements made by the defendant was properly allowed into evidence and the trial court did not err in denying defendant's motion to suppress.

V.

The defendant claims that certain personal items taken from him at the time of his arrest on the weapons charge should have been held inadmissible in his trial on the murder charge. This argument is without merit.

[13] The taking into custody, by police, of property of arrested persons for safekeeping does not violate constitutional search and seizure protections. *United States v. Gravitt*, 484 F.2d 375 (5th Cir. 1973), *cert. denied*, 414 U.S. 1135, 94 S.Ct. 879, 38 L.Ed.2d 761 (1974); *United States v. Lipscomb*, 435 F.2d 795 (5th Cir.1970), *cert. denied*, 401 U.S. 980, 91 S.Ct. 1213, 28 L.Ed.2d 331 (1971); *Delatte v. State*, 384 So.2d 245 (Fla. 1st DCA 1980).

[14, 15] Furthermore, after a person allows his personal effects to be taken into custody by police and inventoried, any privacy interest previously attached thereto is dissipated. *United States v. Grill*, 484 F.2d 990 (5th Cir.1973), *cert. denied*, 416 U.S. 989, 94 S.Ct. 2396, 40 L.Ed.2d 767 (1974). The inventory of the defendant's belongings, occurring incident to a lawful arrest did not constitute an unreasonable search; subsequent inspection of the belongings by Officer LaTorre at the jail caused no greater intrusion than the original inventory. Since the belongings had already been exposed to police view under lawful circumstances, Officer LaTorre's inspection did not breach defendant's privacy interest in such belongings since any such right previously existing was relinquished by the defendant when he initially acquiesced to having his property inventoried. *Id.*

The trial court made no error in its denial of defendant's motion to suppress dated April 13, 1981.

VI.

The defendant argues that his detention by Officer McGowan prior to his arrest on the concealed weapons charge constituted an illegal stop under the rationale of *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). As a result, defendant argues, all items seized as a result of the "illegal" stop should be suppressed from evidence as "fruits of the poisonous tree" from which they issued. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). We disagree.

[16] We find, under the circumstances of this case, that no unlawful intrusion occurred when Officer McGowan approached Mr. Lightbourne for the purpose of investigating a suspicious car called to his attention by a concerned citizen of the community. Although defendant is correct in his assertion that the officers had no probable cause or well-founded suspicion that the defendant was about to commit or had committed any crime, under the instant facts such a showing was not necessary. The officers were responding to a call and were not acting on their own "hunch" as in the "roving patrol" cases.

In *Terry*, the Supreme Court noted that, "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the street." 392 U.S. at 34, 88 S.Ct. at 1886 (White, J., concurring). This is so even under normal conditions with officers having no concrete suspicion on which to rely. Of course in such situations a person would be under no duty to remain, and could continue on his way if he chose to do so. That person, instructed the *Terry* Court, "*absent special circumstances* may not be detained or frisked but may refuse to cooperate and go on his way." *Id.* (Emphasis added.)

[17] There exists, therefore, a distinction between an intrusion by police amounting to a "seizure" of the person and an encounter which intrudes upon no constitutionally protected interest. *Terry v. Ohio; United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *United States v. Elmore*, 595 F.2d 1036 (5th Cir.1979), *cert. denied*, 447 U.S. 910, 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980).

Officer McGowan's investigation of the suspicious vehicle in this case does not rise to the level of an unconstitutional stop or seizure. Officer McGowan simply approached the parked car, asked defendant a few simple questions as to the reason for his presence there, his current address, and then ran a routine check on defendant's car and identification. Surely the average, rea-

sonable person, under similar circumstances, would not find the officer's actions unduly harsh. There is nothing in the record that would indicate that prior to defendant voluntarily relinquishing his driver's license to Officer McGowan he was not free to express an alternative wish to go on his way. The Court need not consider here the question of what would happen if a citizen, asked for identification under somewhat similar conditions, and who upon declining to surrender such identification, was placed under arrest. The implication is that in reality, rather than theory, one who has been so confronted by an officer is not free to leave.

The Supreme Court has repeatedly acknowledged the need for police questioning as a tool for effective enforcement of our criminal laws. *United States v. Mendenhall.* Florida courts have recognized that, in this context, law enforcement officers can indeed initiate contacts with citizens without creating a stop and seizure situation.

In *State v. Rawlings*, 391 So.2d 269 (Fla. 4th DCA), *petition denied*, 399 So.2d 1145 (Fla.1981), an individual heard some shots outside his home and, upon investigating saw someone outside, but could not identify him. He called the police who arrived on the scene to find the defendant and a woman on the street in the vicinity. The officer engaged the defendant in conversation and while doing so, noticed the outline of a gun in his back pocket. The officer then conducted a pat-down search which revealed a .25 caliber pistol. The court in *Rawlings* held that the police in that case did not have a founded suspicion to justify a detention of the defendant. However, while the court agreed that there was insufficient evidence of an articulable basis of founded suspicion presented at the hearing on the motion to suppress, it nevertheless found that the police activity in this case did not constitute a detention of the defendant. Thus no showing of founded suspicion was required to justify the encounter. The court went on to add:

> A mere contact between a citizen and a police officer which evokes *voluntary* cooperation on the part of the citizen is not a "seizure" within the meaning of the Fourth Amendment. If, during a lawful and extremely temporary encounter between a police officer and a citizen, probable cause is formulated to believe that the citizen is carrying a dangerous weapon, a frisk of that citizen's person is entirely justified to insure the safety of the police officer.

Id. at 270.

In *Carter v. State*, 370 So.2d 1181 (Fla. 4th DCA), *cert. denied*, 378 So.2d 343 (Fla. 1979), the court, citing *Mullins v. State*, 366 So.2d 1162 (Fla.1978), *cert. denied*, 444 U.S. 883, 100 S.Ct. 173, 62 L.Ed.2d 113 (1979), recognized that there would be instances where legitimate contact between police officers and citizens, not based upon founded suspicion of criminal activity or probable cause, might result in the subsequent arrest of the citizen for a crime detected by the officer as a result of the legitimate contact.

In the case sub judice we find that no "stop" or "seizure" of the defendant within the meaning of *Terry* and its progeny occurred prior to his removal from the car by Officer McGowan to conduct the pat-down search. Officer McGowan was simply performing his duty as a police officer to investigate a citizen complaint, motivated by a concern that the defendant might be in need of assistance. Once on the scene, the officer acted prudently for the protection of the safety of the concerned citizen and his neighbors in the community when he proceeded to check out the defendant's car and identification.

[18] Given the fact that the initial contact was justified, the ultimate pat-down was also justified in that defendant's furtive movements and nervous appearance when observed by Officer McGowan formulated a reasonable ground to believe that the defendant was armed and potentially dangerous. *United States v. Tharpe*, 526 F.2d 326 (5th Cir.1976); *Jackson v. State*, 403 So.2d 1116 (Fla. 5th DCA 1981). The officer in this case acted with prudence and

was entitled to execute the limited search for weapons which might be used to assault him. *Terry v. Ohio.*

Based on the foregoing, we hold the officer's initial contact with the defendant to have been legitimately initiated for the purpose of investigating the citizen's call regarding a suspicious vehicle. We further hold that such contact as is evidenced by these facts did not constitute a stop or seizure of the defendant under *Terry* principles. Finally, the objectively discernible actions of the defendant provided Officer McGowan with a reasonable ground for searching the defendant for dangerous weapons. As such, we therefore hold that the gun and subsequent items found as a result of the search of the defendant's car incident to his lawful arrest on the weapon's charge, were correctly admitted into evidence by the trial court, and the court did not err in denying defendant's motion to suppress said items.

VII.

Defendant argues that certain videotaped statements made of him while he was being interrogated by police officers should have been held inadmissible under the rationale of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). We disagree.

The record reflects that defendant was twice advised of his *Miranda* rights; at the Marion County jail when picked up, and prior to his interrogation at the Sheriff's Department Operations Center on February 3, 1981. When asked if he understood his rights, the defendant stated that he did, and that he had no reason not to talk to the interrogators. The interview was promptly terminated when defendant finally expressed his wish to state nothing further.

Defendant argues that sometime prior to the termination of the interview, he sought to conclude the questioning by asking whether he had to continue. This inquiry, argues the defendant, evidenced a reassertion of his right to cut off the interrogation, and therefore any statements subsequently made by defendant should have been inadmissible due to a lack of a *second* waiver of his *Miranda* rights.

[19, 20] The thrust of defendant's argument goes to whether or not the defendant did indeed reassert his right to remain silent when he inquired whether or not he must continue the interview. Under the facts of this case we cannot say that defendant wished to conclude the interview at the time he made his inquiry, and even if he did so intend, his subsequent actions evidenced a second knowing waiver after such attempt.

[21] An express statement by an accused that he fully understands and waives his *Miranda* rights is not necessary for a valid waiver of those rights. This is as true mid-interview as it is at its inception. Waiver may be shown by attendant circumstances and by actions of the accused. *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *United States v. Hayes*, 385 F.2d 375 (4th Cir.1967), *cert. denied*, 390 U.S. 1006, 88 S.Ct. 1250, 20 L.Ed.2d 106 (1968); *State v. Craig*, 237 So.2d 737 (Fla.1970).

The fact that defendant knew of his right to end the interrogation is made manifest by his finally stating that he wished to say nothing further and ending his conversation at that point. We find that the mid-interview inquiry made by defendant did not rise to the level of a reassertion of his *Miranda* rights requiring a second waiver of those rights. However, even if such inquiry were to be held tantamount to a reassertion, we find that by his actions defendant once again waived his rights.

After the defendant questioned his need to go on, he voluntarily resumed his responses to the interviewers. There has been no showing made of any coercive measures taken by the interviewing officers to induce further testimony from defendant. Indeed, quite the opposite is reflected by the record. It is therefore apparent in this case that defendant's conduct evidenced a voluntary waiver of his known constitutional rights throughout the interrogation process.

We find that the trial court properly considered the videotape and surrounding testimony in this case and clearly determined that the statements were freely and voluntarily made in light of *Miranda*. Consequently, the trial court did not err in admitting into evidence, over defendant's motion to suppress, the statements made by defendant during his custodial interrogation on February 3, 1981.

VIII.

The defendant argues that the trial court erred in denying defendant's motion to impose sanctions under Florida Rule of Criminal Procedure 3.220(j), for the state's failure to properly notify defendant of a deposition to be taken of a listed state witness. See Fla.R.Crim.P. 3.220(d).

As the record reflects, defendant's admitted motivation for filing the motion in the first place was to insure that all future depositions would be properly noticed, thus assuring defendant's opportunity to be present at those depositions. The trial court, after a hearing on the motion, ordered that all future depositions be properly noticed, thereby satisfying defendant's concern.

[22, 23] Finding that a motion under Rule 3.220(j) is properly addressed to the discretion of the trial court, and finding no abuse of discretion in this case, we hold there was no error in the court's decision not to impose sanctions greater than admonishment of both parties, as was done in this case.

IX.

The defendant claims that the death sentence imposed upon him in this case is not justified, arguing that it was based upon inappropriate aggravating circumstances, that the court failed to consider an unenumerated mitigating circumstance, and that the mitigating circumstances outweigh the aggravating circumstances.

[24] In the instant case, following presentation of evidence at the penalty phase, the jury returned an advisory recommendation of death. In imposing the death penalty in this case the trial court found five aggravating and two mitigating factors. Of course the sentencing procedure is not merely a counting contest in which the number of aggravating factors is compared to the number of mitigating factors, with all factors having equal weight. *State v. Dixon*, 283 So.2d 1 (Fla.1973). Rather the process involves a reasoned judgment as to what factual circumstances weigh heavily toward or against the imposition of the ultimate penalty.

We will first consider the mitigating factors due to their relatively straightforward import. The trial judge found that the defendant was twenty-one years old at the time of the crime and had no significant history of prior criminal activity. § 921.141(6)(a) and (g), Fla.Stat. (1981). Contrary to defendant's assertions, we find that the defendant's lack of past history of violence was not overlooked in consideration of sentence, but rather was not proved by the defendant. The trial court properly considered all matters.

[25] We find no error in the court's failure to find the unenumerated mitigating factor of defendant's previous lack of violent history. Moreover, as will be shown hereafter, the strength of the aggravating circumstances in this case would have supported the imposition of the death penalty even had defendant's lack of past violent history been found as a mitigating factor.

Next we review the aggravating circumstances found to exist in this case.

Aggravating Circumstances

[26] 1. *The capital felony was committed while the defendant was engaged in the commission of a burglary and sexual battery.* § 921.141(5)(d), Fla.Stat. (1981). The evidence presented to the jury in this case, and considered by the learned trial judge at sentencing was clearly sufficient to establish the burglary and sexual battery. A screen had been cut and a window of victim's house had been pried open and broken. Testimony revealed that the defendant had

admitted surprising the victim in her home, that he took some money, a necklace, and a small silver coin bank. The phone cords had been severed. Viable sperm and semen traces were discovered in the victim's vagina indicating sexual relations at approximately the time of death. The defendant's blood type was consistent with semen and blood tests and factors present therein as testified to by experts. Pubic hair found at the crime scene was miscroscopically matched with those of the defendant. These facts and others contained in the record in this case are clearly sufficient to support the findings of burglary and sexual battery. As such they also stand sufficiently strong to support the aggravating circumstance under section 921.141(5)(d).

The evidence was sufficient to show premeditated design. During the burglary the victim was forced into acts of oral sex and intercourse as she begged him not to kill her. Despite her pleas that he not kill her, defendant fired a shot striking her on the left side of the head. The weapon was held against a pillow at the time it was fired. The examining doctor said she bled to death. Defendant's argument with respect to the unconstitutional effect of "automatic" aggravating circumstances solely in the felony murder context is inappropriate in this case.

[27] 2. *The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.* § 921.141(5)(e), Fla. Stat. (1981). Once again the evidence presented at trial strongly supports this aggravating circumstance. Defendant admitted knowing the victim. Plainly the defendant killed to avoid identification and arrest. Proof of the requisite intent to avoid detection is strong in this case. *See Riley v. State*, 366 So.2d 19 (Fla.1978).

[28] 3. *The capital felony was committed for pecuniary gain.* § 921.141(5)(f), Fla.Stat. (1981). Defendant says that the consideration of murder for pecuniary gain and murder while engaged in a burglary is a doubling of aggravating circumstances. We have held in applying the aggravating circumstances that the trial court does not improperly duplicate robbery and pecuniary gain where defendant committed the crime of rape in conjunction with the murder. *Brown v. State*, 381 So.2d 690 (Fla.1980), *cert. denied*, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981). There was adequate proof of rape.

[29] 4. *The capital felony was especially heinous, atrocious, or cruel.* § 921.141(5)(h), Fla.Stat. (1981). Taking into consideration the totality of circumstances in this case, the murder and the events leading up to its consummation were carried out in an unnecessarily torturous way toward the victim. The record reflects that the victim was forced to submit to sexual relations with defendant prior to her death, while pleading for her life, and we cannot say that the trial court's finding of heinousness is at material variance with the facts.

[30] 5. *The capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.* § 921.141(5)(i), Fla.Stat. (1981). We find that the defendant cut phone lines, entered the house at a time when others would most likely not be present, and effected the execution-style killing using a pillow placed between the murder weapon and the victim's head. As such, the trial court could properly find this aggravating circumstance.

[31] For the foregoing reasons it is held that the trial court did not err in imposing the death sentence upon the defendant in accordance with the advisory recommendation of the jury.

In the performance of our constitutional duty we have reviewed the entire record below and have considered all issues presented on appeal. Therefore we now hold that the defendant's judgment of conviction and sentence of death are hereby affirmed.

It is so ordered.

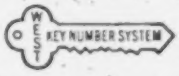
ALDERMAN, C.J., and BOYD and EHRLICH, JJ., concur.

McDONALD, J., concurs in the conviction, but dissents from the sentence.

OVERTON, J., dissents with an opinion.

OVERTON, Justice, dissenting.

I reluctantly dissent because I find the recent United States Supreme Court decision in *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), mandates a reversal under the circumstances of this case. A jailhouse informer was placed in a cell adjacent to the appellant's and was requested to keep his ears open. The investigating officer understood that the informant expected something in return for his information, and the informant was paid two hundred dollars in cash, in addition to being released nineteen days early in return for his services. These factors make the informant an agent of the state under the dictates of *Henry*, which requires suppression of the statements made by the appellant to the informant in the absence of *Miranda* warnings. I find we have no choice but to grant a new trial.



BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY, Petitioner,

v.

Thomas G. GRICE and Lilla Grice, Personal Representatives of the Estate of Debbie Diane Grice, Respondents.

No. 62174.

Supreme Court of Florida.

Sept. 22, 1983.

Upon petition for review of a decision of the District Court of Appeal, 413 So.2d 88, which reversed a dismissal of a complaint against county for improper venue, the Supreme Court, Boyd, J., held that trial court has discretion to dispense with home venue privilege or government entities when a governmental body is sued as a joint tort-feasor and exercise of such discretion must be guided by considerations of justice, fairness, and convenience under the circumstances of the case; in its discretion, trial court may retain entire case, sever and transfer the cause of action against the entity asserting the privilege if it is severable, or transfer the entire case but the privilege, although not absolute, should be given substantial consideration in such process along with the other considerations presented and the interests of other parties.

Decision approved in part and quashed in part; cause remanded with directions.

Ehrlich, J., filed specially concurring opinion in which Adkins and Overton, JJ., joined.

1. Appeal and Error ⇐78(4)

Although an order concerning venue is ordinarily considered interlocutory, it may result in a final order dismissing the complaint.

2. Appeal and Error ⇐78(4)

An order and a motion to dismiss may not be final but an order which actually dismisses the complaint is final for purposes of an appeal.

3. Appeal and Error ⇐78(4), 428(2)

Where original order ruling that venue was improper actually dismissed the complaint against hospital and county, it was a final order subject to a motion for rehearing and the filing of motion for rehearing therefore tolled time for filing the appeal and since notice of appeal was filed within 30 days of trial court's denial of motion for rehearing, District Court of Appeal had jurisdiction over the appeal. West's F.S.A. R.App.P.Rules 9.020(g), 9.130.

4. Venue ⇐22(9)

Trial court has discretion to dispense with home venue privilege for government entities when a governmental body is sued as a joint tort-feasor and exercise of such discretion must be guided by considerations of justice, fairness, and convenience under the circumstances of the case; in its discretion, trial court may retain entire case, sever and transfer the cause of action against

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, OCTOBER 26, 1983

IAN LIGHTBOURNE,	**	
Appellant,	**	CASE NO. 60,871
vs.	**	Circuit Court Case No. 81-170 (Marion)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant, and reply thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

C
cc: Hon. Frances E. Thigpin, Clerk
Hon. William T. Swigert, Sr., Judge

Jerry T. Lockett, Esquire
Sean Daly, Esquire

MOTION FILED
DEC 23 1983

83-5973

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

IAN DECO LIGHTBOURNE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Ian Deco Lightbourne, who is now imprisoned in the custody of the Florida Department of Corrections, asks leave to file the accompanying Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has proceeded in forma pauperis at all times in the state courts below. Petitioner has attached hereto his affidavit in substantially the form prescribed by Fed. Rules App. Proc., Form 4, and the Rules of this Court.

Respectfully Submitted,

Jerry T. Lockett

Jerry T. Lockett
Austin & Lockett, P.A.
Post Office Drawer 1930
Leesburg, Florida 32749-1930
(904) 728-1020

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

IAN LIGHTBOURNE,

Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, Ian Lightbourne, being first duly sworn, depose and say that I am the petitioner in the above entitled cases; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [X]

a. If the answer is "Yes", state the amount of your salary or wages per month, and give name and address of your employer.

b. If the answer is "No", state the date of last employment and the amount of the salary and wages per month which you received. date of last employment - 12/30th/80 - $540 a month from September to Dec. 30th/80

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or from self employment? Yes [ ] No [X]

b. Rent payments, interest or dividends? Yes [ ] No [X]

c. Pensions, annuities or life insurance payments? Yes [ ] No [X]

d. Gifts ~~or inheritance~~? Yes [X] No [ ]

e. Any other sources? Yes [ ] No [X]

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months. 5/17th/83 - $20 - Mother

10/28th/83 - $50 - Mother gifts.

3. Do you own cash, or do you have money in a checking or saving account? Yes [X] No [ ] (Include any funds in prison accounts)

If answer is "yes", state the total value of the items owned. $10.00 in a savings account.

Prison account $0.00 - no

4. Do you own any real estate, stocks, bonds, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes [✓] No [ ]

If the answer is "yes" describe the property and state its approximate value. 6 shares common stock - Pan American World Airways - portfolio value $48 - 7/29th/83

5. List the persons who are dependent upon your support, state your relationship to those persons and indicate how much you contribute toward their support.

no dependants

I understand that a false statement to any questions in this affidavit will subject me to penalties for perjury.

"I declare under penalty of perjury that the foregoing is true and correct.

SIGNED ON 12/12th/83
(Date)

Dan D. Lighthouse
(Signature)

STATE OF FLORIDA)

COUNTY OF BRADFORD)

XXXXX XXXXX being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Dan D. Lighthouse
Signature of Petitioner

SUBSCRIBED and SWORN to before me this [illegible] day of [illegible], 1983.

[illegible]
NOTARY PUBLIC

My Commission Expires:

My Commission Expires February 9, 1986

83-5078

83-5078

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IN THE

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OCTOBER TERM 1983

IAN DECO LIGHTBOURNE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

AFFIDAVIT

I, Jerry T. Lockett, Counsel for Petitioner and a member of the Bar of this Court, depose and say:

1. That the enclosed Petition for Writ of Certiorari was mailed first-class postage prepaid at the Main Branch of the United States Post Office, Leesburg, Florida on December 23rd, 1983.

2. That the petition for writ of certiorari was mailed within the permitted time and was therefore timely filed under Rule 28, Section 2, of the Rules of this Court.

Jerry T. Lockett

Jerry T. Lockett
Austin & Lockett, P.A.
Post Office Drawer 1930
Leesburg, Florida 32749-1930
(904) 728-1020

SWORN TO and SUBSCRIBED before me this 22nd day of December, 1983.

Notary Public

83-5973

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OCTOBER TERM 1983

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CERTIFICATE OF SERVICE

I, Jerry T. Lockett, hereby certify that I am a member of the bar of the Supreme Court of the United States, and that I have served copies of the Petition for Writ of Certiorari together with an Appendix, Motion for Leave to Proceed in Forma Pauperis, Notice of Appearance, Certificate of Mailing, in the above case on counsel for respondent by depositing same in the United States mail, first class postage prepaid, addressed as follows.

Sean Daly
Assistant Attorney General
125 North Ridgewood
4th Floor, Becks Building
Daytona Beach, Florida 32014

All parties required to be served have been served. Done this 23rd day of December, 1983.

Jerry T. Lockett

Jerry T. Lockett
Austin & Lockett, P.A.
Post Office Drawer 1930
Lewisburg, Florida 32749-1930
(904) 728-1020

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